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THE EXECUTIVE COUNCIL, WITH SPECIAL REFERENCE TO MASSACHUSETTS¹

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The Massachusetts constitution of 1780 provided that there should be a council "for advising the governor in the executive part of the government." The governor was authorized to convene the council at any time at his discretion "for the ordering and directing the affairs of the commonwealth." Without the advice and consent of the council, the governor was declared to be incapable of exercising any of his powers of convoking, adjourning, or proroguing the legislature, of making appointments to office, of pardoning criminals, or of authorizing by warrant the expenditure of public moneys. The governor was not made dependent upon the advice and consent of his council in exercise of his legislative powers. He might at discretion recommend measures to the legislature and veto legislative enactments, but no executive authority whatsoever was entrusted to him alone, to be exercised without his council's advice and consent, except the command of the armed forces of the commonwealth. In short, the governor, though declared to be the supreme executive magistrate of the commonwealth, without the consent of his council was impotent in the conduct of state administration.

In the beginning the Massachusetts council was chosen by the legislature, and constituted one of the chief agencies relied upon by the revolutionary "fathers" to protect the people against the menace of executive usurpation and tyranny. Similar bulwarks of liberty were established in most of the other states. In Pennsylvania, indeed, so jealous were the revolutionary

¹ A paper read at the eleventh annual meeting of the American Political Science Association.

statesmen of executive power, that they created a council which was itself the chief executive of the state. There was no governor, and the president of the council had no more power than any of his associates. Eventually, however, most of the states which had originally established executive councils abolished them, transferring the power to "advise and consent" to executive appointments to the state senates, and leaving the governors to exercise their other executive powers unchecked by any other executive body. In only three states, Maine, New Hampshire and Massachusetts, has the original executive council survived.

In Massachusetts the position of the council was materially altered by a constitutional amendment adopted in 1855. Its members were made elective directly by the people, and thereby rendered independent of the legislature with respect to the exercise of their powers. Consequently in Massachusetts today the governor has a much stronger position for dealing with the legislature than in most states, where the senates can make their consent to appointments contingent upon executive subservience in legislative affairs. The Massachusetts chief executive, therefore, can be a more effective leader, both in his own party and in the conduct of affairs of state, than in the other states, other things being equal. Although the council is not able to exercise much influence upon the governor in his relations with the legislature, its executive authority is limited only by the limits of the authority of the governor. If the governor were in fact, as he is in name, the "chief executive magistrate of the commonwealth," the importance of the council would be very great.

It is interesting to consider what the authority of the governor and council would be, if the constitution were observed to the letter. The fundamental law prescribes that "all orders and directions" necessary and proper for the management of the affairs of the commonwealth shall be made and issued by the governor and council. This would seem to require that administrative rules and regulations of every kind, as well as special orders and directions not couched in the general form of a rule

or regulation, should be issued by the governor and council. For example, when the legislature provides that only pure food and drugs shall be offered for sale in the commonwealth, it would seem to be the constitutional duty of the governor and council to establish standards of purity, and provide by executive order for their enforcement by the officers of the law. When the legislature provides that mill machinery shall be made reasonably safe, that adequate protection shall be provided against noxious fumes and dust, or that due care shall be taken by factory-owners of the lives and health of their employees, it would seem to be the constitutional duty of the governor and council to frame regulations to interpret and give practical effect to such general expressions as "reasonably safe," "adequate protection," and "due care." So in the matter of the regulation of public service corporations, the governor and council should be charged with the responsibility for the elaboration of the rules by which the reasonableness of rates or the adequacy of service may be determined. Had the Massachusetts constitution been literally obeyed, we might have developed a splendid *Conseil d'Etat*, composed of a few chief councillors elected by the people, and a larger number of appointed members, each chosen for exceptional proficiency in a special field of administration, and altogether forming such a body of experts as can be found today nowhere in this country in the service of a state government. Such an executive council would have been a priceless heritage.

It is possible to conceive a different development. Since the growth of party spirit and the development of powerful party organizations in the states, many of the original relationships among the organs of government have been profoundly altered. The chief executive magistrate in particular has become in the eyes of the people more and more the official spokesman for his party, and therefor the chief legislator of the state, so far as partisan legislation is concerned. The governor might conceivably have treated his councillors, or at least those of the same party faith, as the official council of his party, used them as his personal representatives before the legislature, and made of

them the instruments of an effective executive leadership in legislative affairs. It may be conceded that the difficulties in the way of such a development would have been great, since the councillors are elected by districts and are responsible to no one but the people of their respective districts. Yet the attempt might conceivably have been made.

In fact neither of these developments has come to pass. The social and industrial legislation of the last half century has tended always to establish quasi-coördinate executive boards and commissions for the elaboration of administrative regulations of the kind the English would call statutory rules and orders. Or else it has filled the statute books themselves with the very administrative orders and directions for the purpose of advising and consenting to which the council was originally created. In either event the effect has been the same. The governor has been stripped of most of the powers necessary and proper for a chief executive magistrate, and has been reduced to the position of a sort of official public agitator, whose chief function is to bully the legislature into the enactment of the laws required to fulfill his campaign pledges.

The executive council has shared in the degradation of the governor. Occasionally, when the majority of the council are of the opposite party to the governor, it plays politics with his appointments. It makes a poor board of pardons, and the legislature has thought it wise to create a special board of pardon and parole, appointed by the governor. It makes a fair board for the auditing of the governor's contingent fund. Otherwise it cuts no important figure. The real executives of the state are the attorney-general, the dozens of administrative boards and commissions, and the courts.

The Massachusetts councillors are usually men of ability and character. The truth is, however, that they are attracted to the council less by the importance of their official work than by the dignity of their official idleness. They could be dispensed with at any time, and they would scarcely be missed. But the work that they might have done, or had a hand in doing, had the constitutional development of the state taken a differ-

ent turn, has not yet been undertaken, or if undertaken, has not always fallen into the right hands. There is a genuine need for a real executive council, a council which shall help to centralize the responsibility for the conduct of state administration in the hands of a real chief executive magistrate, and which shall help to strengthen him in his relations with the legislature.